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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 22.

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc., a Delaware corporation,

Petitioner,

against

A. W. PERRY, INC., a Massachusetts corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENT

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INDEX

PAGE

Opinions Below 1

Statement of Facts 2

Statutes Involved 4

Question Presented 5

Summary of Argument 5

Argument:

I The claim is founded upon an express contract, and is thus *prima facie* a debt of the bankrupt which may be proved and allowed against its estate under section 63 (a) (4) of the Act. Under the terms of the covenant the termination of the lease by way of conditional limitation gives rise to a claim for damages coincidentally with the tenant's bankruptcy, and the damages so contracted for are ascertainable at the time of the bankruptcy. The claim is thus an existing liability at petition filed and is in its nature provable and allowable; all that remains is to liquidate the damages, if any, under section 63 (b) of the Act, in accordance with the presently accessible standard provided by the covenant 7

(a) Provability of the claim in bankruptcy is supported by the reasoning of this Court in *Manhattan Properties, Inc.* v. *Irving Trust Company* 9

(b) There is no general rule in bankruptcy which excludes claims for damages under special covenants in leases. The provability of such claims depends on the terms of the particular covenant 12

PAGE

II The inclusion of the special covenant may and does give rise to a provable claim 19

III The damage covenant in the lease is fair, and does not sound as a penalty whether or not the damages are discounted as directed by the court below 26

IV The fair rental value for the residue of the term is readily ascertainable 34

V The recent amendments to the Bankruptcy Act do not affect the provability of the instant claim 37

VI The decision of the Circuit Court of Appeals for the Second Circuit, remanding the claim for liquidation in accordance with its opinion, should be affirmed 43

TABLE OF CASES CITED

Clarkson v. *Skidmore,* 46 N. Y. 297 35

Gardiner v. *William S. Butler & Co., Inc.,* 245 U. S. 603 ..... 8, 17, 21, 22

Hathaway v. *U. S.,* 249 U. S. 460 31
Hermitage Co. v. *Levine,* 248 N. Y. 333 31

In re Ells, 98 Fed. 967 (D. C. Mass.) 16, 19
In re McAllister-Mohler Co., 46 Fed. (2d) 91 (D. C. S. D. Ohio) 17
In re Marshall's Garage, Inc., 63 Fed. (2d) 759 (C. C. A. 2nd) 30
In re Roth & Appel, 181 Fed. 667 (C. C. A. 2nd) 13, 14, 15, 16, 19, 39
In re Schultz & Guthrie, 235 Fed. 907 (D. C. Mass.) 36

Kothe v. *R. C. Taylor Trust,* 280 U. S. 224, 4, 8, 16, 19, 25, 27, 28, 29, 31, 33

Little v. *Banks,* 85 N. Y. 258 31

PAGE

Manhattan Properties, Inc. v. *Irving Trust Company,* 291 U. S. 320,
3, 6, 8, 9, 10, 11, 12, 16, 17, 18, 24, 38, 39

Sun Printing & Publishing Ass'n v. *Moore,* 183 U. S. 642 28

U. S. v. *Bethlehem Steel Co.,* 205 U. S. 105 ..... 28, 31
U. S. v. *United Engineering Co.,* 234 U. S. 236 .... 28, 31

Watson v. *Merrill,* 136 Fed. 359 24
William Filene's Sons Co. v. *Weed,* 245 U. S. 597 ..... 3, 8, 10, 17, 19, 22, 23, 24, 25, 32
Same case (C. C. A. 1st), 230 Fed. 31 23
Wise v. *U. S.,* 249 U. S. 361 31

TABLE OF STATUTES CITED

Bankruptcy Act of July 1, 1898 (30 Stat. 562, as amended; U. S. C., Title 11):

Section 1 (11) (U. S. C., Title 11, Section 1) 5
Section 17 (U. S. C., Title 11, Section 35) 5
Section 63 (U. S. C., Title 11, Section 103),
4, 5, 18, 19, 37
clause (a) (1) 4
clause (a) (4) 4, 5, 7, 15
clause (a) (7) 37, 40, 42
clause (b) 5, 6, 7

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BRIEF OF RESPONDENT.

Opinions Below.

Neither the opinion of the Referee (R. 13-23) nor the opinion of the District Court (R. 26) is reported in the Federal Reporter or Federal Supplement. The opinion of the United States Circuit Court of Appeals (R. 31-34) is reported at 69 Fed. (2d) 90.

Statement of Facts.

In 1929 the respondent, A. W. Perry, Inc., entered into a written lease with the bankrupt herein, Outfitters Operating Realty Co., Inc. (then known by its former name of Lerner Stores Corporation), by which respondent leased to the bankrupt certain premises at No. 459 Washington Street, Boston, Massachusetts, for a term expiring December 31, 1944 at a specified progressive rental (R. 6-11). The lease contained the following covenant (R. 10):

> "* * *; and, for the more effectual securing to the Lessor of the rent and other payments herein provided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee shall be deemed to constitute a breach of this lease, and thereupon, *ipso facto* and without entry or other action by the Lessor, this lease shall become and be terminated; and, notwithstanding any other provisions of this lease, the Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof less the fair rental value of the premises for the residue of said term."

The bankrupt filed a voluntary petition in bankruptcy in the District Court of the United States for the Southern District of New York on September 30, 1932, and was adjudicated bankrupt on the same day (R. 1).

On March 29, 1933, the respondent filed its proof of claim in the sum of $177,788, based upon the provision

of the lease above quoted (R. 4-12). The petitioner, Irving Trust Company, as the Trustee in Bankruptcy, moved to expunge the claim and a hearing was had before the Referee at which it was stipulated that the question of the amount of the claim, if provable, was reserved and that the parties might thereafter offer testimony liquidating the amount, if any (R. 12-13).

The Referee expunged the claim (R. 13-23). On petition for review the order was affirmed by the District Court, in a memorandum decision by GODDARD, J., on the authority of previous decisions of the Circuit Court of Appeals for the Second Circuit (R. 26).

Upon appeal to that court the judgment of the District Court was reversed and the claim remanded for liquidation in accordance with the opinion of the Circuit Court of Appeals. The opinion by L. HAND, C. J., stated that this Court had held in *Manhattan Properties, Inc.* v. *Irving Trust Company,* 291 U. S. 320, that claims for future rent are ordinarily not provable and can become so, if at all, only by virtue of special clauses; that the question here was whether the instant clause would serve; that its possible validity was specifically reserved in this Court's opinion in the *Manhattan Properties* case; that the covenant in the instant lease avoided the objections that had invalidated claims under other covenants, since the claim was not contingent either in right or in amount at petition filed. The opinion recognized that under the authority of *William Filene's Sons Co.* v. *Weed,* 245 U. S. 597, the instant covenant liquidated "the damages upon a footing familiar and fair," but intimated some doubt whether the clause was for an invalid penalty

under *Kothe* v. *R. C. Taylor Trust,* 280 U. S. 224. The opinion expressly disclaimed decision of that question however, and, construing the damage clause in accordance with its patent general purpose to give the lessor indemnity and no more, held that "the proper measure of damage is the sum of the discounted series of installments, each made up of the rent reserved, less the fair rental value for that period."*

Certiorari was granted by this Court on May 14, 1934 (R. 37).

Statutes Involved.†

Section 63 of the Bankruptcy Act provides:

> "*Debts which may be proved.* (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied; * * *.

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*The opinion did *not* interpret the clause as providing for discounting the *minuend, i. e.* the rent reserved for the residue of the term, as petitioner incorrectly states on page 3 of its brief.

†On June 7 and 18, 1934 (subsequent to the granting of certiorari herein), section 63(a) was amended by adding three new clauses thereto, which are relied on by petitioner only to show that it must have been the thought of Congress that claims for damages under covenants in leases were not theretofore provable. See Point V below (pp. 37-42).

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Section 1 (11) provides:

"'debt' shall include any debt, demand or claim provable in bankruptcy;"

Section 17 provides:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts" * * * with exceptions not here material.

(Act of July 1, 1898, Sections 1, 17 and 63, 30 Stat. 562, as amended; U. S. C., Title 11, Sections 1, 35 and 103.)

Question Presented.

Is the respondent's claim, founded on the express covenant contained in its lease to the bankrupt, a provable claim under section 63 of the Bankruptcy Act?

Summary of Argument.

The claim is founded upon an express contract, and is thus *prima facie* a debt of the bankrupt which may be proved and allowed against its estate under section 63 (a) (4) of the Act. Under the terms of the covenant the termination of the lease by way of conditional limitation gives rise to a claim for damages coincidentally

with the tenant's bankruptcy, and the damages so contracted for are ascertainable at the time of the bankruptcy. The claim is thus an existing liability at petition filed and is in its nature provable and allowable; all that remains is to liquidate the damages, if any, under section 63 (b) of the Act, in accordance with the presently accessible standard provided by the covenant.

Provability of the claim in bankruptcy is supported by the reasoning of this Court in *Manhattan Properties, Inc.* v. *Irving Trust Company, supra.*

There is no general rule in bankruptcy which excludes claims for damages under special covenants in leases. The provability of such claims depends on the terms of the particular covenant.

The inclusion of the special covenant may and does give rise to a provable claim.

The damage covenant in the lease is fair, and does not sound as a penalty whether or not the damages are discounted as directed by the court below.

The fair rental value for the residue of the term is readily ascertainable.

The recent amendments to the Bankruptcy Act do not affect the provability of the instant claim.

The decision of the Circuit Court of Appeals for the Second Circuit, remanding the claim for liquidation in accordance with its opinion, should be affirmed.

Argument.

I

The claim is founded upon an express contract, and is thus prima facie a debt of the bankrupt which may be proved and allowed against its estate under section 63 (a) (4) of the Act. Under the terms of the covenant the termination of the lease by way of conditional limitation gives rise to a claim for damages coincidentally with the tenant's bankruptcy*, and the damages so contracted for are ascertainable at the time of the bankruptcy. The claim is thus an existing liability at petition filed and is in its nature provable and allowable; all that remains is to liquidate the damages, if any, under section 63 (b) of the Act, in accordance with the presently accessible standard provided by the covenant.

Although the instant case is of first impression in bankruptcy, both in this Court and elsewhere, the principles applicable thereto have been enunciated by this Court in earlier decisions. The present inquiry is therefore to ascertain what the tests are of the provability of claims under damage covenants in leases, and to determine whether the instant claim meets those tests. The

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*The court below held that the claim was "not contingent in right, because the mere filing of a petition in bankruptcy puts an end to the lease" (R. 32). Petitioner does not question the correctness of this conclusion (see footnote on p. 13 of its brief), nor apparently do the *amici curiae* in support of petitioner.

provability of claims under damage or indemnity covenants has been before this Court in four cases, and only four. They are, chronologically:

William Filene's Sons Co. v. *Weed,* 245 U. S. 597 (1918);
Gardiner v. *William S. Butler & Co., Inc.,* 245 U. S. 603 (1918);
Kothe v. *R. C. Taylor Trust,* 280 U. S. 224 (1930);
Manhattan Properties, Inc. v. *Irving Trust Co.,* 291 U. S. 320 (1934).

The rationale of the *Filene* case (followed in the companion *Gardiner* case), in which a claim was allowed in an equity receivership under a damage covenant practically identical with that in the instant case,—and the reasoning of the *Kothe* and *Manhattan Properties* cases, in which claims were disallowed in bankruptcy solely because of defects in the covenants which here do not exist,—clearly establish principles which require that the instant claim be allowed. Respondent's claim meets the test of all four of these decisions.

We shall first consider the *Manhattan Properties* case, with some of the leading decisions of the lower Federal courts. The *Gardiner* and *Filene* cases are more particularly discussed under Point II below, and the *Kothe* case under Point III.

(a)

Provability of the claim in bankruptcy is supported by the reasoning of this Court in Manhattan Properties, Inc. v. Irving Trust Company.

Our case presents the question of whether a landlord may prove in bankruptcy for damages where the claim is founded upon the tenant's covenant that his bankruptcy shall be deemed a breach of the lease and entitle the landlord to damages equal to the rent reserved for the residue of the term less the fair rental value of the premises for the residue of the term.

In *Manhattan Properties, Inc.* v. *Irving Trust Co., supra,* at page 328, this Court began by saying:

> "These cases present the question whether a landlord may prove in bankruptcy for loss of rents payable in the future, where the claim is founded upon the bankrupt's covenant to pay rent, and, in the alternative, upon his breach of a covenant that in event of bankruptcy, the landlord may re-enter, and if he does, the tenant will indemnify him against loss of rents for the remainder of the term."

At the close of the opinion, after describing a covenant of the kind then at bar, the Court concluded as follows (p. 338-9):

> "Such a covenant is not, as petitioners contend, the equivalent of an agreement that bankruptcy shall be a breach of the lease and the consequent damages to the lessor be measured by the difference between the present value of the remainder of the term and the total rent to fall due in the future. The covenants appearing in the leases in question cannot be made the basis of a proof of debt against the estate."

The differences between the questions then and now before the Court are two:

(a) Here no argument is made that a landlord may prove for loss of future rents "where the claim is founded upon the bankrupt's covenant to pay rent." The first part of the *Manhattan Properties* opinion has disposed of that general question, in the negative.

(b) Here the covenant in the lease contains none of the provisions which influenced this Court, in considering "the effect of the indemnity covenants in the leases," to hold the claims in the *Manhattan Properties* decision non-provable. Those objectionable provisions, as itemized by the Court in the second part of the opinion (pp. 337-338), compared with the corresponding provisions in the instant covenant, are as follows:

In the Manhattan Properties case—	*In the instant case—*
The indemnity covenants did not provide "for liquidation of damages (compare *Wm. Filene's Sons Co.* v. *Weed, supra*), nor indeed for any right to damages for breach of the covenant to pay rent".	The covenant provides for liquidation of damages and for a right to damages, and the liquidation clause follows the identical principle of the clause upheld in the *Filene* case.
The landlord had the choice whether he would terminate the lease, though neither the bankrupt nor the trustee had any such option (except as the latter might disclaim).	The landlord does not have the choice whether he will terminate the lease, and so far as the covenant can provide the landlord, the bankrupt and the trustee are all treated on the same footing, by operation of the *ipso facto* clause.

In the Manhattan Properties case—

Upon the exercise of the landlord's option a new contract became operative, and there could be no color of a claim of anticipatory breach of this new contract of indemnity, since it came into being not by virtue of the bankruptcy but by force of the act of re-entry, which must occur at a date subsequent to the filing of the petition.

The indemnity contract could not be breached until the duty of indemnifying the landlord arose, which obligation could not be complete until the expiration of the original term.

In the instant case—

Whether or not the liquidated damage provision be considered as a new contract, there is no need for a claim of anticipatory breach, since the provision *does* become operative by virtue of the bankruptcy and *not* by force of the act of reentry or any other act which occurs at a date subsequent to the filing of the petition.

The damage contract is breached, and the obligation to the landlord arises and is complete, coincidently with the bankruptcy.

In short, as this Court said (p. 338):

> "There can be no debt provable in bankruptcy arising out of a contract which becomes effective only at the claimant's option and after the inception of the proceedings, the fulfilment of which is contingent on what may happen from month to month or up to the end of the original term." (citing cases)

The Court then concluded the opinion with the passage already quoted describing and distinguishing a type of covenant *identical with that involved in the present case.* If the covenants in the *Manhattan Properties* case had

met the objections which the Court enumerated, and if the covenants had been of the different type which the Court described, the conclusion is unescapable that the claims in the *Manhattan Properties* case would have been allowed.

(b)

There is no general rule in bankruptcy which excludes claims for damages under special covenants in leases. The provability of such claims depends on the terms of the particular covenant.

We should have supposed this proposition self-evident, and especially clear from the discussion in the second part of the *Manhattan Properties* decision as outlined above. If the Court had thought all such covenants ineffective it would presumably not have taken such pains to point out objections to the particular covenants then at bar, or to distinguish a form of covenant such as that involved in the instant case. However, as the *amici curiae* in support of petitioner expressly question the proposition (p. 15), and as both they and petitioner ground their case on the assumption that all claims under damage covenants are non-provable as a matter of bankruptcy law, we shall consider for the moment whether any possible authority for their position can be found. After all, if it appears that the courts treat each covenant on its own merits, we may properly conclude that the results would not have been achieved without recourse to some reason. And once the necessity for a reason is recognized, as distinguished from a historical rule without reason, very little of petitioner's case is left.

Petitioner has abandoned its contention in the court below (the Circuit Court of Appeals for the Second Circuit) that the instant claim is one for future rent; and the cases holding such claims not provable in bankruptcy are of course not relevant to the present question of a claim for damages under a special covenant in a lease. We may briefly point out, however, that the basis of those decisions was the nature of rent. Its peculiar character was well described in *In re Roth & Appel,* 181 Fed. 667 (C. C. A. 2nd, 1910), where the court began by saying, at page 669:

> "Rent is a sum stipulated to be paid for the use and enjoyment of land. The occupation of the land is consideration for the rent. If the right to occupy terminates, the obligation to pay ceases. Consequently, a covenant to pay rent creates no debt until the time stipulated for the payment arrives. The lessee may be evicted by title paramount or by acts of the lessor. The destruction or disrepair of the premises, may, according to certain statutory provisions, justify the lessee in abandoning them. The lessee may quit the premises with the lessor's consent. The lessee may assign his term with the approval of the lessor, so as to relieve himself from further obligation upon the lease. In all these cases the lessee is discharged from his covenant to pay rent. The time for payment never arrives. The rent never becomes due."

However, when we progress beyond the provability of claims for future rent as such to the provability of claims under express damage covenants in leases, we find that the difficulties which have confronted landlords in proving claims against bankrupt tenants have not

arisen from the law of real estate, but from the law of bankruptcy. The circumstance that the landlords' claims under covenants have been disallowed in the great numerical majority of decisions only goes to show that the great numerical majority of leases have not complied with the requirements of the Bankruptcy Act, as those requirements have been laid down by the courts. We do not find the courts disallowing such claims under covenants on any broad ground that all claims under covenants are non-provable, but on the ground that the covenant in the particular lease involved did not, for some specific reason or reasons, give rise to a debt of a kind which Congress intended to be provable in bankruptcy.

The grounds on which claims for damages, under special covenants in leases, have been held not provable in bankruptcy may on analysis be stated as two.* Avoiding extended citations, we shall again refer to *In re Roth & Appel,* where both were present. There a landlord sought to prove a claim under a lease which provided that upon the tenant's bankruptcy the landlord should have a right to re-enter, and that if the landlord did so the tenant would thereafter pay to the landlord "on the first day of each month, as upon rent days, the difference between the rents * * * agreed to be paid by the lessee and those otherwise reserved or with due diligence collectible." The court rightly refused to allow the claim, because it could not arise until after bankruptcy, saying (181 Fed. 667, 672):

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*The rejection of claims on the ground that they constitute penalties is of course not peculiar to bankruptcy and is treated in Point III below (pp. 26-34).

"Indeed, looking at the claim as it existed either at the time of the petition or the adjudication, it was altogether contingent in its nature:

(1) It was uncertain, as just pointed out, whether the lessor would re-enter and terminate the lease.

(2) In case the lease was terminated, it was uncertain whether there would be any loss in rents. If the rent received by the landlord from the new tenant equaled or exceeded that stipulated in the lease, there would be no loss, and, consequently, no foundation for any claim upon the indemnity covenant."

With no prohibition of statute or decision against doing so, the parties to the lease now in question advisedly contracted for a measure of compensation commensurate with such loss as the landlord might suffer in the event of his tenant's bankruptcy. This was done by the covenant now to be construed providing in certain and definite language and by way of limitation that the term or estate should be instantly determined by and upon the happening of bankruptcy and that a fixed liability, for a certain or presently ascertainable sum, should then arise and exist. The intention was by a free contract to avoid the cases which rejected landlords' claims on the grounds stated in *In re Roth & Appel,* or on the ground that the damages agreed upon involved an improper penalty. Thus by the general law applicable to the relation of landlord and tenant there conclusively arose an existing liability upon an express contract which indisputably comes within the definition of provable claims found in section 63 (a) (4) of the Bankruptcy Act.

Not only have the courts, in disallowing claims under covenants in leases, confined their reasons to factors not now present, but they have also often expressly indicated that covenants might well be made which would give rise to provable claims. Thus, in *In re Roth & Appel, supra,* a case repeatedly cited, the court said (181 Fed. 667, 671):

> "Undoubtedly the parties to a lease may agree that bankruptcy shall terminate it, and that, upon such termination, all future installments of rent shall at once become due and payable. In such a case, the installments may be regarded as consolidated by the contract, or, perhaps, as falling due by way of penalty. Not improbably claims based upon such leases are provable in bankruptcy."

(Damages contracted for on such a basis were disallowed in *Kothe* v. *R. C. Taylor Trust, supra,* but only on the ground that they constituted a penalty.)

In re Ells, 98 Fed. 967 (D. C. Mass., 1900), was one of the first cases decided under the present Bankruptcy Act; it was cited by this Court in the *Manhattan Properties* case both in its discussion of the general question and in demonstrating the defects of the particular indemnity covenants there involved. Notwithstanding that Congress had failed to include any provision expressly allowing proof of damages suffered by landlords, Judge LOWELL said in disallowing the claim, which was under an indemnity covenant effective upon re-entry (p. 969):

> "Doubtless, the covenant might have been expressed otherwise. If the debtor in this case had made a contract to take a lease at a fixed rent, and

> had broken the contract by refusing to execute the lease, damages for the entire breach could have been recovered at once, and might perhaps have been estimated at the difference between the rent stipulated in the contract and the rental value of the premises. A covenant in a lease might be worded expressly to require the lessee, in case of re-entry, to pay at once damages calculated upon this basis."

In *In re McAllister-Mohler Co.*, 46 Fed. (2d) 91 (D. C. S. D. Ohio, 1930), the court expressed a similar opinion in commenting upon *William Filene's Sons Co.* v. *Weed, supra,* and *Gardiner* v. *William S. Butler & Co., Inc., supra,* saying at page 95:

> "These cases are a complete answer to the contention that, if a landlord cannot prove a claim for anticipatory breach of a lease, he is remediless, for it is clearly within his power to protect himself by an appropriate clause in the lease."

We know of no authority to support the position that all claims for damages under special covenants in leases are non-provable in bankruptcy. Nor do we find any such authority cited in the briefs of the petitioner and the *amici curiae* in its support. They seek, however, to deduce such a conclusion from that part of the opinion of this Court in the *Manhattan Properties* case which dealt with the general question there presented, namely, "whether a landlord may prove in bankruptcy for loss of rents payable in the future, where the claim is founded upon the bankrupt's covenant to pay rent". Throughout the Court's discussion of that question there is not one word about special covenants for damages. The part of the opinion which dealt with the specific

question—"the effect of the indemnity covenants in the leases"—petitioner dismisses with a footnote (p. 12).

As the court below has said, the possible validity of the clause now involved "was specifically reserved in the Supreme Court's opinion" in the *Manhattan Properties* case. The *amici curiae* assert, however (p. 11), that the instant claim cannot be provable unless the *Manhattan Properties* case is reversed and a certain quotation therefrom (discussing the general question) is substantially modified. We are at a loss to understand on what basis such an assertion could be made, unless it were placed on the ground that the Court's entire discussion of the specific question, and particularly its closing statements, were an egregious and misleading dictum.

Finally, as petitioner and the *amici curiae* in its support are themselves only too eager to emphasize, "The sole inquiry is the intent of the Act." Having so said this Court in the *Manhattan Properties* case examined the earlier bankruptcy statutes and the discussion which preceded the passage of the present Act, and concluded that "the failure to include a provision for claims for loss of rent or for damages consequent on the abrogation of leases, is significant of an intent not to depart from the precedents disallowing them" (291 U. S. 320, 335). The Court then pointed out that such claims had been held not provable debts in the well-nigh unanimous view of the Federal Courts reiterated for over thirty years, and also that from 1898 to 1932 the Act was amended seven times without alteration of Section 63a.

> "This is persuasive [the Court continued] that the construction adopted by the courts has been acceptable to the legislative arm of the government."

But if the courts' construction was acceptable to Congress, are we to believe that their reasoning was not? Beginning with the explicit suggestions made by Judge LOWELL in *In re Ells* just after the Act was passed, followed by those of *In re Roth & Appel* twenty-four years ago, down through the distinction between bankruptcy and equity clearly drawn by this Court in the *Filene** case, and the implications of its decision in the *Kothe*† case—all leading authorities on the subject—the reasoning of the courts has been instinct with the understanding that the provability of claims for damages under special covenants in leases depends on the terms of the particular covenant.

That is the construction of Section 63a which has been acceptable to the legislative arm of the government. And there is no evidence that a construction unfavorable to the instant covenant would be acceptable to Congress, since so far as we have been able to ascertain such a covenant has never been before the courts.

II

The inclusion of the special covenant may and does give rise to a provable claim.

The petitioner states the question as being whether a landlord and tenant can "turn an otherwise non-provable claim into a provable claim merely by stipulating" that upon bankruptcy of the tenant the lease shall *ipso*

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*Discussed in the next Point, at pp. 22-24.

†See Point III below, at pp. 27-29.

facto terminate and the tenant thereupon be liable to pay liquidated damages. Such an inquiry begs the question: the issue is whether or not the instant claim is provable. The most forcible refutation of this attempted argument, originally expressed in the Referee's decision (R. 19), is contained in the opinion of the court below, the Circuit Court of Appeals for the Second Circuit.

After discussing the common forms of covenant designed to protect the lessor in case of re-entry and pointing out that the covenant in the lease at bar avoids both the difficulties mentioned (contingency in right and in amount), the court per L. HAND, C. J., said (R. 32):

> "The argument contra may be stated as follows: If bankruptcy be an anticipatory breach, as it is, then, in a case where the lessee has promised to pay the loss, the promise or the whole series of promises, is repudiated at once. To calculate the damages, as in the case of other anticipatory breaches, the value of the consideration restored—in this case the land—will be presently estimated by the best means accessible. The result is exactly the measure to which the parties have themselves agreed in the covenant at bar. If the calculation be too contingent for a bankruptcy claim when there is no covenant, why is there* not when there is?"

The court below then went on to dispose of this point, saying (R. 33):

> "This argument loses sight of the real objection to allowing the claim when damages have not been liquidated. That is not because the rule for measuring damages is too vague or uncertain to be man-

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*So in original.

> ageable in bankruptcy; but that, though it is the best approximation available, it is still only a forecast and a forecast in these circumstances will not do for bankruptcy which is more rigid as to such issues than other proceedings, an action at law, for example. It is the uncertainty in fact of the loss that invalidates the claim; that is not remedied by an approximation which the law will accept in other connections. But when the parties have agreed that the lessee shall pay a sum to be ascertained by an accessible standard, the bankruptcy court is not liquidating a future loss at all; in its place the parties have substituted a promise, which does not look to the future, which is to pay the difference between two amounts presently ascertainable."

This reasoning of the court below, in thus disposing of petitioner's fundamental argument, is so compact that we should like briefly to point out its application to several aspects of the case and particularly to petitioner's argument thereon. It will not be amiss, also, to show how the steps in this reasoning are supported by the expressed views of this Court.

The first inquiry is whether, as a general principle and apart from the statutory requirements of bankruptcy, the inclusion of an express covenant in a lease may give rise to a provable claim for damages, notwithstanding that without such a covenant the landlord would not be permitted to prove a claim even though his actual loss were just as great. *Gardiner* v. *William S. Butler & Co., Inc., supra,* is direct authority for the answer that such a result *is* achieved by the inclusion of an express covenant.

That case involved the provability in an equity receivership of two claims filed by landlords. One claim

was under a lease providing that in case of re-entry the lessee should pay to the lessor the difference between the rental value and the rent and other payments required for the residue of the term. The other claim was for similar damages, but simply on the ground that the landlord had lost the benefit of his bargain, the lease not containing any clause stipulating for such an allowance. The lower courts had disallowed both claims. This Court allowed the claim under the lease which contained the express covenant, though disallowing the claim under the lease which contained none. The case thus holds that the parties may by contract confer on the landlord a right to damages enforcible in an equity receivership which he would not otherwise have, even though he suffered the same actual loss. And this enforcible right may be conferred even in a lease, though, as the Court said, "the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke."

If this be true in equity, what of bankruptcy? The answer is afforded by the reasoning on which this Court reversed the court below in *William Filene's Sons Co.* v. *Weed, supra,* decided concurrently with the *Gardiner* case. In the *Filene* case the lease provided for re-entry in case of the tenant's failure to perform any covenant. Pursuant to a default in rent subsequent to the tenant's receivership, the landlord reentered. In the lease the tenant agreed, upon its termination as provided for, to pay the landlord the sum of certain discounted $20,000 per year payments and also the difference between the rental value and the rent and other payments named in the lease for the residue of the term (with

allowance for such of the first item as had been paid). The landlord's claim for these items was disallowed below, the court believing that the analogy of bankruptcy applied and that "The claim arises too late" (230 Fed. 31, 38). This Court stated that it perceived no ground that would justify the rejection of the first item of the claim, and went on to say (245 U. S. 597, 601-602):

> "Certainly the fact that the termination of the lease happened after the filing of the bill has no such effect, although the sum was not presently payable until then. When a statutory system is administered the only question for the courts is what the statutes prescribe. But when the courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts except from the court's hands, they have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. In order to make a distribution possible they must of necessity limit the time for the proof of claims. But they have no authority to give to the filing of the bill the effect of the filing of a petition in bankruptcy so as to exclude any previously made and lawful claim that matures within a reasonable time before distribution can be made."

The Court accordingly reversed the decree and allowed both the first item of the claim, and the second—"This also was contracted for and we see no reason why it should not be paid."

Quite obviously a like result would not have been achieved in bankruptcy, because "The claim arises too

late." That was the defect which would have excluded such a claim under the statutory system. The petitioner unwittingly so concedes in referring, at page 18 of its brief, to the otherwise forgotten second part of the *Manhattan Properties* decision where "this Court excluded claims based upon covenants for indemnification effective only after the date of the filing of the petition in bankruptcy." Having thus labored to establish the conclusion that the result of the *Filene* case would not have been achieved in bankruptcy, petitioner abandons further analysis of that opinion. And quite naturally, as there is no way of escaping its necessary implication that if, as here, the claim had arisen and become effective at the time of petition filed, it would have been provable in bankruptcy.

Next comes the aspect of the matter which most concerned the court below: Granting that by virtue of an *ipso facto* clause, or (as the court suggested) the doctrine of anticipatory breach, a claim would be provable if not otherwise objectionable, and recognizing that in a case where the lessee has promised to pay the loss the damages consequent on such a breach would be calculated by exactly the measure to which the parties have agreed in the covenant at bar, then "If the calculation be too contingent for a bankruptcy claim when there is no covenant, why is it not when there is?"

For answer we may again turn to petitioner's brief. "In bankruptcy the distinction has to do with the *subject matter*" (p. 19) and "It is, however, the nature of the claim * * * that conditions its provability in bankruptcy" (p. 20, quoting *Watson* v. *Merrill,* 136 Fed. 359). What is the nature, the subject matter of the

instant claim? The claim is not for such actual future loss as may or may not occur, requiring an approximation or liquidation unacceptable to bankruptcy; but

> "in its place the parties have substituted a promise, which does not look to the future, which is to pay the difference between two amounts presently ascertainable" (R. 33).

If the nature of the claim is a promise to pay damages, its provability in bankruptcy should be judged by the tests applicable to promises to pay damages. These, we have seen, are met: the claim is upon an immediate right to immediate damages.

Nor will it avail to urge that for "historical" reasons the words of the promise do not mean what they say, or should be construed to mean something quite different, or should be rejected as private attempts to rewrite the Bankruptcy Act. In the *Filene* case an express promise to pay damages was enforced as such and in strict accordance with its terms. In discussing the second item of the landlord's claim (the difference between the rental value at the date of entry and the rent reserved), this Court said:

> "The contract was not that all the rent for the term should become presently due, it was not for rent at all, but was a personal covenant that liquidated the damages upon a footing that was familiar and fair."

In *Kothe* v. *R. C. Taylor Trust, supra,* the *ipso facto* clause giving rise to damages was identical with that in the instant case, but the damages stipulated were

"an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof." This Court disallowed the landlord's claim in bankruptcy on the sole ground that the provision was for an unenforceable penalty. The entire discussion turned upon liquidated damages, even though the measure agreed on was the full amount of the rent reserved. If this Court had thought the claim one for future rent and the covenant a subterfuge for amending the Bankruptcy Act by contract, that would have furnished a short way of disposing of the case. But the Court did not adopt it.

III

The damage covenant in the lease is fair, and does not sound as a penalty whether or not the damages are discounted as directed by the court below.

The damage covenant in the lease is fair,—

To appraise the fairness of the covenant, let us see what result will follow if this Court affirms the judgment below.

At the hearing before the Referee, on the order to show cause why the respondent's claim should not be disallowed and rejected, it was stipulated that "in case the Referee shall find that the claim is a provable claim, the question of the amount at which it shall be allowed is reserved and the parties may thereafter offer testimony liquidating the amount, if any" (R. 13). In reversing the order of the District Court, the Circuit Court of Appeals remanded the claim for liquidation in accordance with its own opinion (R. 34).

If, then, this Court affirms the judgment below the claim will be remanded for liquidation. Evidence will presumably be offered as to the fair rental value of the premises for the residue of the term, and such determined. The computation will then be made, as directed by the court below, of "the sum of the discounted series of installments, each made up of the rent reserved, less the fair rental value for that period."

In affirming the judgment below this Court will not be allowing the respondent's claim at any particular amount (nor indeed at any amount at all, as the fair rental value may be found to equal or exceed the rent reserved), but will only be affording the respondent an opportunity to prove in the bankruptcy such damages as respondent may actually be able to establish under the covenant in the lease. If, as the result of the testimony and computation, the respondent is unable to establish any such damages, no claim against the bankrupt estate will result. The evidence may be inadequate to establish respondent's right to damages in whole or in part. That will be a matter for decision by the court when the proofs are offered. If damages are so established and a claim is allowed in some amount, it will be because it has been judicially determined that respondent has suffered a loss under the terms of its bargain.

—and does not sound as a penalty—

If the covenant is fair from the standpoint of practical operation, may it yet be invalid for legal reasons? The petitioner, as well as the court below, has expressed the view that the determination of this question is governed by *Kothe* v. *R. C. Taylor Trust, supra;* we are quite con-

tent to accept that case as laying down the applicable test. There the lease provided that upon the filing of a petition in bankruptcy the lease should *ipso facto* and without entry terminate, and that the landlord should forthwith "be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof." The lease was for a term of two years, and at the time of the bankruptcy had fifteen months to run. The landlord filed a claim for an amount equalling the rent for the balance of the term, which the Circuit Court of Appeals for the First Circuit allowed.

In considering the question this Court began by referring to its previous decisions* to the effect that when the intention of the parties in contracts for liquidated damages is ascertained it is ordinarily the duty of the court to carry it out, and that such contracts when reasonable in their character are not to be regarded as penalties and may be enforced between the parties. The Court continued (280 U. S. 224, 226):

> "But agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced. This circumstance tends to negative any notion that the parties really meant to provide a measure of compensation—'to treat the sum named as estimated and ascertained damages.'
>
> Here, we find the lessee in a lease for two years agreeing that the mere filing of a petition in bank-

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**Sun Printing & Publishing Ass'n* v. *Moore*, 183 U. S. 642; *U. S.* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119; *U. S.* v. *United Engineering Co.*, 234 U. S. 236, 241.

> ruptcy against him shall be deemed a breach and thereupon, *ipso facto,* it shall be terminated and the lessor shall become entitled to re-enter, also to recover damages equal to the full amount of the rent reserved for the remainder of the term. The amount thus stipulated is so disproportionate to any damage reasonably to be anticipated in the circumstances disclosed that we must hold the provision is for an unenforceable penalty."

In concluding, the Court said (p. 227):

> "Considering the time which the lease here involved had to run, nothing else appearing, it seems plain enough that the real design of the challenged provision was to insure to the lessor preferential treatment in the event of bankruptcy. The record discloses no circumstance sufficient to support a contrary view. If the term were much shorter, or there were facts tending to disclose a proper purpose, the argument in favor of the lessor would be more persuasive."

The Court thus expressly indicated that not every claim for damages based on an *ipso facto* clause in a lease is to be rejected in bankruptcy: the Court's objection went solely to the point that the stipulated damages were of an arbitrary amount, unrelated to any actual loss suffered. The tenant, said the Court, had little concern with the *amount* of the claim to be presented against the bankrupt estate, and the real design was to insure the landlord *preferential* treatment. The opinion seemed to assume that the parties could validly contract for some damages to become due on bankruptcy, and disallowed the claim solely because it was equal to the full amount of the rent reserved for the remainder

of the term. And even that basis might not be improper, the Court intimated, if the term were much shorter than the two years actually involved.

What then would tend to disclose a proper purpose? Clearly a provision which showed "that the parties really meant to provide a measure of compensation." And what could be a fairer measure of compensation than for the landlord to give full credit for what he receives back and to confine his claim to the difference between that value and the contracted rental?

—whether the damages are discounted as directed by the court below—

Petitioner's only objection to the measure of damages stipulated in the lease is that it contains no provision for discounting the minuend—"an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof"—to its present value. Petitioner argues that in consequence the minuend sounds as a penalty (p. 35). In thus directing attention to the undiscounted minuend, petitioner avoids mentioning the fact that under the covenant neither is the subtrahend discounted. Thus, though the landlord receives credit for the face value of the installments of rent payable in the future, he is obliged to give credit for the face amount of the rental value in the future.

The court below* construed the damage clause "in accordance with its patent general purpose to give the

*Probably in keeping with the directions for discounting damages which it had given in *In re Marshall's Garage, Inc.*, 63 Fed. (2nd) 759 (C. C. A. 2nd, 1933), where the claim was upon the bankrupt's contract to purchase land six years in the future.

lessor indemnity and no more," and therefore held that "the proper measure of damage is the sum of the discounted series of installments, each made up of the rent reserved, less the fair rental value for that period." This method of discounting the remainder, in the case of each installment, of course produces the same result as discounting both the minuend and the subtrahend. Petitioner makes no claim that the damage covenant, when so construed as providing for a discount, is still invalid as a penalty, but contends that the result was one the court below was not free to reach, quoting on page 36 from *Hermitage Co.* v. *Levine,* 248 N. Y. 333, 338. The case itself is not in point, and the language quoted loses all applicability when we recall that the New York Court of Appeals adheres to the liberal doctrine of construing liquidated damage provisions (where reasonable) in accordance with the intent of the parties. *Little* v. *Banks,* 85 N. Y. 258, 266 (1881). That doctrine has been adopted and consistently followed by this Court, and its decisions thereon were expressly the basis on which the court below felt free to reach the result in question.* Petitioner ignores their effect.

Petitioner further argues that this Court did not attempt a discounting construction in the *Kothe* case. Exactly so,—for there, following this same line of authority, the Court sought to ascertain the intent of the parties and concluded therefrom that "the real design of the challenged provision was to insure to the lessor preferential

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*R. 34, citing *U. S.* v. *Bethlehem Steel Co.,* 205 U. S. 105, 119; *U. S.* v. *United Engineering Co.,* 234 U. S. 236, 241; *Wise* v. *U. S.,* 249 U. S. 361, 365, 366; *Hathaway* v. *U. S.,* 249 U. S. 460, 464.

treatment in the event of bankruptcy." In that case the patent general purpose of the covenant was not to give the landlord indemnity,—it was to give him a claim equalling his full rent, in addition to restoring to him the consideration therefor.

—or whether the damages are not so discounted.

But even if this Court should hold that the court below went beyond the permissible bounds of construction, or erred in interpreting the intent of the parties, the damages without discount would not be unenforceable as a penalty. The court below thought that an undiscounted recovery would "surely be more than compensatory", but expressly disclaimed any decision that such a conclusion would invalidate the whole clause.

The court's refusal to so decide was inevitable, in view of this Court's holding in the *Filene* case that such a covenant "liquidated the damages upon a footing that was familiar and fair." There at the time of the receivership and the subsequent re-entry by the landlord, the several terms granted by the lease had from over five to eight years to run. The master had computed the damages strictly in accordance with the covenant—by adding up the rent reserved and deducting the rental value.* The resulting dollar amount was expressly approved by this Court in concluding its opinion. The Court's failure to comment on the absence of discount is the more significant because the Court had just considered the matter in connection with the master's com-

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**William Filene's Sons Co.* v. *Weed*, October Term, 1917, No. 93, Transcript of Record, pp. 66-68.

putation of the discount under the $20,000 per year clause, where the parties had expressly provided therefor. Thus if the liquidated damages as computed by the master were mathematically more than compensatory, this Court nevertheless held them to be fair and enforceable. They fell far short of being "so disproportionate to any damage reasonably to be anticipated in the circumstances disclosed that we must hold the provision is for an unenforceable penalty", as the Court said in the *Kothe* case. And obviously a provision unenforceable as a penalty would have been just as unenforceable in equity as in bankruptcy.

The inherent fairness of the covenant in the instant case is quite overlooked by the *amici curiae* in support of petitioner, who state (pp. 14-15 of their brief) that it does not differ in substance from a covenant that upon bankruptcy of the lessee "the lessor shall have a provable claim in the amount of $177,788." Obviously a covenant in such terms would be unenforceable as a penalty: as this Court said in the *Kothe* case, "agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced." In the present case the damages stipulated bear not only a reasonable relation to the probable damage, but an absolutely direct relation thereto.

The *amici curiae* in support of petitioner argue that if the decision below is sustained the instant covenant will appear in many leases and landlords "will absorb the major portions of bankrupt estates" (p. 15). Whether landlords who may obtain such covenants will share in any portion of their tenants' bankrupt estates will of course depend on the testimony adduced as to the losses

sustained under the covenants. The argument is fallacious in its premise—it assumes that the landlord is getting something to which he is not entitled. But if and to the extent that a landlord establishes his damages under a covenant which meets the requirements of the Bankruptcy Act, why should he not be allowed to share in the estate with the other creditors? The *amici curiae* then ask us to imagine the effect of the instant covenant in a hypothetical 999 year lease,—which we shall do, as best we can. If the witnesses were unable to satisfy the referee as to the certainty of their testimony regarding the fair rental value for any later part of the term, he would disregard their testimony and adopt the next best evidence available—the rental fixed by the parties themselves in the lease. Under the formula the remainder for those years or months would then be zero, and the landlord's claim would be confined to the years for which he could satisfy the referee of an actual difference in value. The whole argument is moot, however, as Congress has now imposed a narrow limit on all such claims.*

IV

The fair rental value for the residue of the term is readily ascertainable.

We should have supposed it obvious that the determination of the subtrahend would present no insuperable difficulty. Computation of the value of terms is every day being made in condemnation proceedings and other

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*See Point V below (pp. 37-42).

proceedings. The indicated steps may be visualized by reference to a case involving the apportionment of surplus moneys realized from the sale of mortgaged premises, *Clarkson* v. *Skidmore*, 46 N. Y. 297 (1871). In considering the amount to be awarded to the lessee of the premises the court said, at pages 302-304:

> "The lessee, as between himself and his lessor, had a right to the possession and enjoyment of the whole of the premises, during the residue of the term of his lease, being six years, subject only to the payment of the rent reserved in the lease and of the annual taxes which he had agreed to pay. * * * To the extent of the value of the rights thus vested in the lessee, the lessor had, by giving the lease, diminished the value of his own estate. * * *
>
> If the rent reserved in the lease was equal to, or more, than the annual value of the premises, then the estate of the lessee was manifestly worthless; but if, on the contrary, as appears to have been the fact, the annual value of the property was much greater than the rent reserved in the lease, the estate of the lessee was of importance, and a serious incumbrance on that of the lessor; and the lessee is entitled to receive its equivalent out of the surplus of the proceeds. * * *
>
> The value of the term must depend upon the circumstances of every individual case; the length of the term and conditions of the lease, the character of the property, its location, the readiness with which it may be let, the condition of the buildings, whether substantial and durable, or requiring frequent repairs, the uniformity of rents in the neighborhood or their fluctuating character; in short, every material consideration which would enter into the mind of a purchaser of the term, in judging

> what would be a fair price for it, and, like other ordinary questions of value, should be determined, as a matter of fact, upon the testimony of witnesses competent to speak upon the subject."

In the instant case the petitioner's objection to the subtrahend clause is based on the possibility of a month-to-month inquiry. Yet in the passage above quoted it will be observed that the court was not disturbed by the thought of an "annual value of the premises", even though the lease had six years to run. And in the instant case the task of appraisal will be simplified by the fact that the premises have been relet for a substantial portion of the bankrupt's former term.

The petitioner also asserts (p. 39) that the fair rental value in the future cannot be estimated because of the lease provisions for termination and abatement of rent. Petitioner forgets that the lease terminated with the filing of the petition in bankruptcy on September 30, 1932, and that thenceforth not a dollar of rent has been or ever will be payable. The term is gone; the fact to be ascertained is the fair rental value of the premises. The provisions mentioned are immaterial, since the bankruptcy court is not required to liquidate a future loss but to carry out the express contract for damages. Even where the contingency is certain eventually to occur as in the case of death, the possibility of its early occurrence, before the expiration date of an employment contract, does not prevent an employee from proving a claim for damages based on the breach of the contract by his employer's bankruptcy. *In re Schultz & Guthrie,* 235 Fed. 907, 908 (D. C. Mass., 1916), where there was not even an express covenant for damages.

V

The recent amendments to the Bankruptcy Act do not affect the provability of the instant claim.

On June 7 and 18, 1934, section 63 of the Bankruptcy Act was amended by adding three new subdivisions, one of which (together with the original introductory words of the section) is as follows:

> "*Debts which may be proved.* (a) Debts of the bankrupt may be proved and allowed against his estate which are * * * (7) claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date: Provided, That the court shall scrutinize the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder: Provided further, That the provisions of this clause (7) shall apply to estates, pending at the time of the enactment of this amendatory Act in which the time for filing such claims has not expired."

Petitioner and the *amici curiae* in its support base part of their argument against the provability of the instant claim on this amendment. Petitioner contends (p.

33), in referring to the words "damages * * *under a covenant contained in such lease"—

> "It must therefore have been the *thought* of Congress that claims for such damages, even though expressly covenanted for, were not theretofore provable in bankruptcy." (Italics ours.)

The *amici curiae* in support of petitioner suggest (p. 31):

> "By new amendments not applicable to this case, Congress has made the instant type of claim provable in a limited amount in future bankruptcies. Therefore, this claim could not have been provable prior to such amendments."

The amendment, under its last proviso, concededly does not apply to the instant proceedings, where the time to file claims expired March 30, 1933 (R. 1), and the only inquiry therefore is: What indication does this 1934 amendment give of the provability of the instant claim under the Act of 1898?

Ever since the passage of the Act of 1898 litigation of landlords' rights in bankruptcies had been a fruitful source of delay in winding up proceedings and of expense to bankrupt estates. The briefs in the *Manhattan Properties* case, particularly that of respondents, well indicate the vast extent of such litigation. Though the unfairness to landlords of the rigid requirements of the Act had often been recognized, it was not until the current depression that this and the foregoing considerations produced an insistent and wide-spread demand for amendment. The epidemic of chain store bankruptcies, simultaneously affecting scores of landlords throughout the country, was probably the immediate cause.

It had proved to be possible for many corporations which found their leases burdensome to pay off all ordinary creditors and the current month's rent, file a voluntary petition in bankruptcy (in a jurisdiction which followed the rule of *In re Roth & Appel*), and thereby bring about the inevitable and anticipated result that the trustee in bankruptcy would disaffirm the leases as unprofitable to the estate. Where the bankrupt was a subsidiary of a holding company, the latter could usually use its substantial inter-company claim to buy in the assets at the bankruptcy sale, thereafter turning them over to a newly organized subsidiary which could continue the business at the lower rentals then obtainable in a distress real estate market. The old subsidiary was, of course, abandoned as an empty corporate shell, and the landlord, who might have been the only one injured by its bankruptcy, would not even have standing in the proceedings to contest their *bona fides* or the validity of the parent company's claim: he was not a creditor.

Then came the *Manhattan Properties* decision, in February of 1934. It extinguished any possibility that landlords could prove claims for future rent under the Act of 1898 as it stood. The Court indicated that by an appropriate covenant like that now at bar a landlord could protect himself, but this of course was no solace to the thousands of landlords who held existing leases containing no such covenant, nor to those future landlords who might not be able to obtain such a covenant from their tenants.

Four months later Congress acted.

To meet such a situation the 1934 amendment embodied two clauses of prime importance. The first was a per-

missive clause which added to the debts of the bankrupt which may be proved and allowed against his estate—

> "claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation,"

The second was a clause restricting the amount allowable on claims under leases, *viz.*:

> "but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such a lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date:"

In so enacting Congress was not concerned with niceties of expression, but was seeking at one stroke to sweep away the many vexed problems of bankruptcy as affecting leases: Litigation would be minimized, landlords would be given some compensation for their loss, and for limiting such compensation a simple rule of thumb was provided. Such an intent was commendable and thoroughly consistent with the practical condition which called forth the amendment. If the courts can see their way reasonably clear to giving effect to such an intent, surely it will be to the best interests of all concerned.

Unfortunately the amendment in its two prime provisions is anything but clear. As the *amici curiae* in support of petitioner say, the language lacks definiteness, it is difficult if not impossible to parse, and parts (if not

most) of it are inartistic and awkward. And the committee reports and amendments on the floor scarcely serve to clarify the situation. An enactment of that type requires some construction by the courts, and the best practical construction to adopt is the one which will minimize uncertainty and future disputes and will give the fullest effect to the wise purpose of the amendment, namely: that all claims of landlords under leases are to be provable (subject to the restriction on amount), whether the leases contain special covenants for damages or not.

If we are correct in believing that Congress desired *all* such claims to be provable, and in believing that the courts should so hold, then plainly no inference can be drawn as to what *particular* claims Congress thought were or were not already provable. To such considerations Congress was indifferent. If the language used perchance included a type of claim which might or might not be already provable (the instant type having never been passed on by the courts), what harm could be done thereby? Congress was thinking only of the result, and was concerned only with laying down a general rule to cover all the varied cases which might arise in the future.

Manifestly in such circumstances the recent amendment throws no light—either one way or the other—on what Congress thought the existing law was as to claims under particular covenants; and it can therefore have no bearing whatever on the provability of the instant claim.

If we are wrong, however, in following more the spirit of the amendment than its language, we cannot see that

the result as to the instant case will be affected. If the differences between the language of the permissive clause and that of the restrictive clause are found so striking as to require a different construction (as they are by the *amici curiae* in support of respondent), it must be observed that the prime difference lies in the inclusion in the restrictive clause of a phrase describing a second class of claims, not mentioned in the narrower permissive clause. And, as the *amici curiae* in support of petitioner well say thereof (p. 29):

> "The phrase 'claim of a landlord * * * for damages * * * under a covenant contained in such a lease' is a perfect description of this claim and was intended as such."

If a perfect description of the instant claim appears in this additional language of the broader clause and not in the narrower clause, is it not reasonable to believe that the claim is one of those intended to be covered by the restriction and thought not covered by the permission?

Incidentally, the above characterization of the instant claim as being within the restriction amply answers the fear expressed on page 16 of the same brief that if this Court sustains the decision below "even the limitation of rent claims to one year of rent in the new clause (7) of Section 63a will be of no avail."

Inferences drawn from subsequent statutes are at most but evidentiary in aiding the court to discharge its exclusive function of determining the meaning of a previous law, and in the present case to attach persuasive retrospective significance to an amendment so inconsistent and indefinite in its terms would be unprecedented.

VI

The decision of the Circuit Court of Appeals for the Second Circuit, remanding the claim for liquidation in accordance with its opinion, should be affirmed.

Respectfully submitted,

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